STATE OF MICHIGAN

COURT OF APPEALS

EARL K. FALK, and WINIFRED FALK,

Plaintiffs-Appellants,

v

ALL ACQUISITION CORPORATION, CARRIER CORPORATION, VIKING PUMP, INC., A.O. SMITH, HONEYWELL INTERNATIONAL, INC., and SEALITE, INC.,

Defendants-Appellees,

and

ALLIS-CHALMERS PRODUCT LIABILITY, AMERICAN STANDARD, INC., APOGENT TECHNOLOGIES, INC., f/k/a SYBRON INTERNATIONAL CORPORATION, ARMSTRONG PUMPS, INC., ATLAS TURNER, INC., f/k/a ATLAS ASBESTOS CO., A.W. CHESTERTON CO., BEHLER-YOUNG COMPANY, BNS CO., f/k/a BROWN & SHARPE MANUFACTURING CO., CBS CORPORATION, CBS OPERATIONS, INC., f/k/a VIACOM INTERNATIONAL, INC., CERTAINTEED CORPORATION, CHICAGO FIREBRICK CO., CLEAVER-BROOKS COMPANY, CRANE CO., f/k/a CRANE DELAWARE CO., CROMPTON CORPORATION, CROWN CORK & SEAL COMPANY USA, INC., DAIMLER CHRYSLER CORPORATION, DAVID BROWN UNION PUMPS CO., f/k/a UNION STEAM PUMP CO. OF BATTLE CREEK, MI, DURABLA MANUFACTURING COMPANY, DURAMETALLIC CORPORATION, EXCELSIOR, INC., FAIRBANKS MORSE PUMP CORPORATION, FLOWSERVE CORP., f/k/a DURCO INTERNATIONAL, INC. DURIRON CASTINGS CO., FLOWSERVE US,

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February 17, 2011

No. 296012
Calhoun Circuit Court
LC No. 2006-002033-NP

INC., a/k/a EDWARD VOGT VALVE COMPANY, FORD MOTOR COMPANY, FOSTER WHEELER, L.L.C., GAGE COMPANY, GARLOCK SEALING TECHNOLOGIES, L.L.C., GENERAL MOTORS CORPORATION, GENERAL ELECTRIC COMPANY, GENERAL REFRACTORIES COMPANY, GOODALL RUBBER COMPANY, GOODRICH CORPORATION, f/k/a B.F. GOODRICH COMPANY, GOODYEAR TIRE & RUBBER COMPANY, GOULDS PUMPS INCORPORATED, GREENE TWEED & CO., HARRISON PIPING SUPPLY COMPANY, IMO INDUSTRIES, INC., f/k/a DELAVAL TURBINE, INC., INGERSOLL-RAND COMPANY, ITT INDUSTRIES, INC., IU NORTH AMERICA, INC., J.O. GALLOUP COMPANY, f/k/a GALLOUP PIPE & SUPPLY COMPANY, LAMONS METAL GASKET COMPANY, LAVELLE INDUSTRIES, INC., MARLO SEALING COMPANY, INC., METROPOLITAN LIFE INSURANCE COMPANY, a/k/a METROPOLITAN INSURANCE COMPANY, MICHIGAN SUPPLY COMPANY, OWENS-ILLINOIS, INC., PARKER-HANNIFIN CORP., PEERLESS PUMPS, RHONE-POULENC AG COMPANY, INC., ROCKWELL AUTOMATION, INC., SEARS ROEBUCK COMPANY, SVI CORPORATION, TACO, INC., UNION CARBIDE CHEMICALS AND PLASTICS, VELLUMOID, INC., WEIL-MCLAIN COMPANY, YARWAY CORPORATION, f/k/a YARMALL WARING CORPORATION, and YORK RUBBER COMPANY,

Defendants.

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

In this products liability action involving asbestos exposure, plaintiffs appeal as of right the trial court's order granting summary disposition in defendants' favor based upon the applicable statute of limitations and dismissing, with prejudice, plaintiffs' claims. Because plaintiffs' claims are time barred by the applicable statute of limitations, we affirm.

Plaintiff[1] was a pipefitter and steamfitter and was exposed to asbestos-containing products supplied by the defendants from 1954 to 1992. Plaintiff first became aware of the dangers associated with asbestos in the 1980's at a union meeting. At that time, plaintiff was told that asbestos could settle in one's lungs and that "[t]hey thought it might [cause cancer] at that time and then we find out later that yes, it would."

Plaintiff testified that he was first informed that he had a disease caused by asbestos in 1993, but to his knowledge, he was not diagnosed with asbestosis. Plaintiff was diagnosed with cancer in his right lung in 1999, but he did not file a lawsuit related to this injury. In 1999, plaintiff's oncologist noted that plaintiff "had previous asbestos exposure." In March 2006, plaintiff's oncologist diagnosed cancer in plaintiff's left lung and noted that plaintiff's history included "1999 right lung cancer, 'related to asbestos'." Plaintiff's expert witness opined that the cancers were each "primary cancers of the lung."

Plaintiff filed the underlying action against the named defendants in May 2006, alleging, among other things, negligence. In October and November 2009, various defendants moved for summary disposition based on the three-year statute of limitations, see MCL 600.5805(10), (13), arguing that plaintiff did not file suit within three years of being diagnosed with lung cancer in 1999. Plaintiff opposed the motions, arguing that he had a new cause of action based on the 2006 lung cancer diagnosis. The circuit court denied summary disposition, holding that there were questions of fact concerning whether plaintiff knew in 1999 that his lung cancer was related to asbestos exposure.

Defendant Honeywell International, Inc. moved for reconsideration (in which other defendants joined), citing plaintiff's deposition testimony which indicated that he was aware, in 1999, that his first lung cancer was possibly related to asbestos exposure. In December 2009, the circuit court issued a written opinion and order on the motion for reconsideration, holding that plaintiff's negligence claims accrued "at the time the wrong upon which the claim is based was done regardless of the time when damage results," MCL 600.5827, and finding that when plaintiff was first diagnosed with lung cancer in 1999, he knew that asbestos exposure could cause cancer. The circuit court concluded that plaintiff's claims were time-barred, and summary disposition was proper.

On appeal, plaintiff argues that the trial court erred in finding that the limitations period began to run in 1999 and thus concluding that the statute of limitations barred his claims for damages resulting from occupational exposure to asbestos. We disagree.

This Court reviews a circuit court's decision on a motion for summary disposition de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by a statute of limitations. A motion for summary disposition under MCR 2.116(C)(7) may be supported by affidavits, depositions,

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[1] Winifred Falk's claims are derivative of Earl Falk's claims. Thus, "plaintiff" shall be used from this point forward to refer to Earl Falk.

admissions, or other documentary evidence, which the Court must consider if they are submitted. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), citing MCR 2.116(G)(5). Where there is no factual dispute, the issue whether a claim is barred by the statute of limitations is a question of law reviewed de novo. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 279; 769 NW2d 234 (2009).

This Court reviews a circuit court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004). An abuse of discretion occurs when the circuit court's decision resulted in an outcome that falls outside the range of principled outcomes. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008).

MCL 600.5805(1) provides that a "person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section." MCL 600.5805(10) provides that the "period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." MCL 600.5805(13) similarly provides that the statute of limitations is three years for products liability actions.

According to MCL 600.5827, the applicable period of limitations runs from the time the claim accrues, unless otherwise expressly provided. The Michigan Supreme Court has interpreted MCL 600.5827 as meaning that a claim accrues when the wrong was done and further explained that "the wrong is done when the plaintiff is harmed rather than when the defendant acted." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 388; 738 NW2d 664 (2007); *Boyle v Gen Motors Corp*, 468 Mich 226, 231 n 5; 661 NW2d 557 (2003). When all of the elements of a cause of action for personal injury have occurred, including damages, the claim accrues and the statute of limitations begins to run. *Stephens v Dixon*, 449 Mich 531, 538; 536 NW2d 755 (1995) (citation omitted). Even if later damages result, "they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred." *Stephens*, 449 Mich at 538 (quotation omitted).

Plaintiff argues that because his 2006 cancer was not related to the 1999 cancer, "the damages associated with the later cancer cannot reasonably be considered later damages to the cause of action that accrued in 1999, but which [plaintiff] did not pursue." However, whether the new cancer is a primary disease or metastatic does not change the fact that it is a later damage of plaintiff's occupational exposure to asbestos. Plaintiff relies upon *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 304-305; 399 NW2d 1 (1986), suggesting that it created a

rule that regardless of prior asbestos-related diagnoses, the occurrence of any new asbestos-related disease constitutes a new accrual of a cause of action.[2]

We do not read *Larson* quite so broadly. Instead, we read *Larson* as holding that individuals who develop non-cancerous asbestos-related diseases and who accordingly have concerns that they will develop cancer need not bring suit relating to those less serious conditions and may instead wait to see if they develop cancer, at which time they would have the right to initiate their claim even though the time since the non-cancerous diagnosis exceeded the statute of limitations. As the Court stated:

> The alternatives facing this Court are: on the one hand, to force all asbestosis victims who do not wish to bring suit for their asbestosis to sue for the possibility of contracting cancer, or on the other hand, to allow these victims to wait until the discoverable appearance of cancer before bringing suit. The latter alternative seems to us infinitely preferable. [*Larson* at 319.]

The Court similarly noted that

> [r]efusing to allow a separate tolling period for cancer in these cases would lead to an increase in the already enormous costs of this litigation by encouraging people to bring lawsuits they would not otherwise have brought and to protract the suits which are brought for as long as possible in order to see if more serious consequences develop. [*Id.* at 318.]

The *Larson* Court relied on these factors to fashion a tolling period unique to asbestos cases, which allowed for a cause of action when a plaintiff suffered from asbestosis, and a new cause of action years later when the separate and independent disease of cancer developed. However, these concerns are not present here, as the disease plaintiff developed in 1999 was itself cancer. Thus, when his 1999 cancer was diagnosed, his cause of action for asbestos-related injury accrued. There was no need for him to wait and see if he would develop cancer at a later point in time; he had already developed it. Consequently, the concerns set out in *Larson* do not arise and the 1999 cancer constituted the sole accrual date for cancer caused by plaintiff's asbestos exposure. Accordingly, plaintiff's claims are barred by the three-year statute of limitations.

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[2] The parties contest whether *Trentadue v Gorton*, 479 Mich 378; 738 NW2d 664 (2007) abolished the specific discovery rule articulated in *Larson*. We need not reach that question, as we find *Larson* inapplicable to the instant case.

Affirmed.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro